

LEGAL DEFINITIONS OF RAPE

International human rights standards and state of play in Europe.

Vrouw en Recht & Amnesty International expert meeting

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INTERNATIONAL HUMAN RIGHTS LAW

A comprehensive definition of rape should:

- Include all non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object (Istanbul Convention, art 36(1)(a); International Criminal Court, “Elements of Crimes” (2011))
- be defined as a crime against a person’s bodily integrity and sexual autonomy, as opposed to a crime against morality, public decency, honour or the family and society (CEDAW, General Recommendation 35, *Vertido v The Philippines*, CEDAW Communication 18/2008)
- There should be no assumption in law or in practice that a victim gives their consent because they have not physically resisted the unwanted sexual conduct regardless of whether or not the perpetrator threatened to use or used physical violence (*M.C. v. Bulgaria* (2003), European Court of Human Rights (ECHR) 651)

ISTANBUL CONVENTION

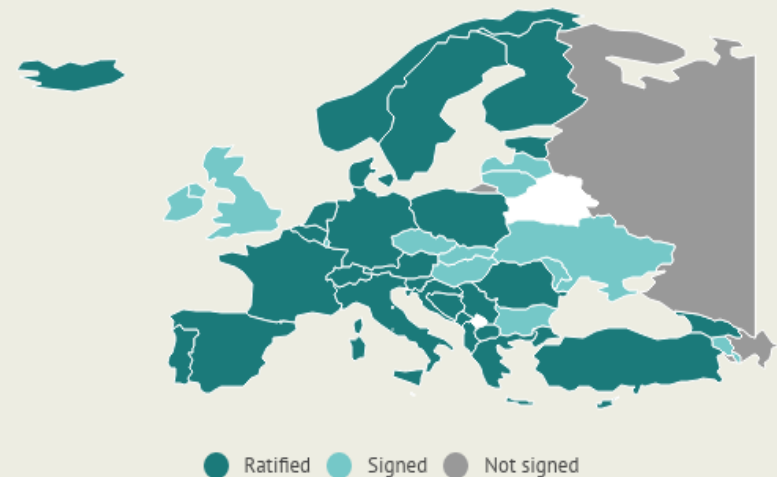
Council of Europe Convention on preventing and combating violence against women and domestic violence

- adopted 2011, entered into force 2014
- 43 signatures (incl. EU), 34 ratifications (as of July 2019)
- The Netherlands: signed 2012, ratified 2015

Status of ratifications:

<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures?desktop=true>

Istanbul Convention on violence against women: Signatures and ratifications



Source: [Council of Europe](#) (18 June 2018)

infogram

ISTANBUL CONVENTION – SEXUAL VIOLENCE

Article 36 – Sexual violence, including rape

1. Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised:
 - a. engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object;
 - b. engaging in other non-consensual acts of a sexual nature with a person;
 - c. causing another person to engage in non-consensual acts of a sexual nature with a third person.
2. Consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances.
3. Parties shall take the necessary legislative or other measures to ensure that the provisions of paragraph 1 also apply to acts committed against former or current spouses or partners as recognised by internal law.

CONSENT

No international or regional human rights instrument provides an exact definition of **consent**. The Explanatory Report to the Istanbul Convention states that it is “left to the Parties to decide on the specific wording of the legislation and the factors that they consider to preclude freely given consent”.

Article 36(2) of the Istanbul Convention specifies that:

“Consent must be given **voluntarily** as the result of the person’s **free will** assessed in the context of the **surrounding circumstances**.”

The Explanatory Report further clarifies that prosecutions “will require a context-sensitive assessment of the evidence to establish on a case-by-case basis whether the victim has freely consented to the sexual act performed. Such an assessment must recognize the wide range of behavioural responses to sexual violence and rape which victims exhibit and shall not be based on assumptions of typical behaviour in such situations. It is equally important to ensure that interpretations of rape legislation and the prosecution of rape cases are not influenced by **gender stereotypes and myths** about male and female sexuality” (para 192).

LEGAL DEFINITIONS OF RAPE. STATE OF PLAY IN EUROPE - 1

In November 2018, Amnesty International published “Right to be Free from Rape”, a report covering

- rape legislation;
- prevalence of rape;
- top-line findings on access to justice for rape in 31 countries in Europe.

Geographical scope:

- European Economic Area (28 European Union Member States, as well as Iceland and Norway) and Switzerland.

March 2019: in-depth report on Denmark

April 2019: joint report on situation in the Nordic countries

LEGAL DEFINITIONS OF RAPE. STATE OF PLAY IN EUROPE - 2

According to the EU's Fundamental Rights Agency survey from 2014:

Approximately 9 million women in the EU have been raped since the age of 15.

However,

Only 9 countries in Europe recognize that sex without consent is rape in law.

In the remaining countries, rape is defined on the basis of

- force or
- threat thereof
- coercion or
- the victim's inability to defend themselves.

CONSENT-BASED DEFINITIONS IN THE EEA

Countries with consent-based laws in the EEA:

1. United Kingdom (comprising England and Wales, Scotland and Northern Ireland)
2. Ireland
3. Belgium
4. Cyprus
5. Luxembourg
6. Iceland
7. Germany
8. Sweden
9. Greece (as of June 2019)



CONSENT-BASED DEFINITIONS IN THE EEA. EXAMPLE 1: UK

UK – 3 jurisdictions: England and Wales, Scotland, Northern Ireland.

England and Wales: consent law for 63 years (Sexual Offences Act 1956, amendments, now Sexual Offences Act 2003, s. 1):

Rape

(1) A person (A) commits an offence if—

- (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
- (b) B does not consent to the penetration, and
- (c) A does not reasonably believe that B consents.

(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

CONSENT-BASED DEFINITIONS IN THE EEA. EXAMPLE 1: UK cont.

Consent in English law

Sexual Offences Act 2003

- Consent is defined as a situation when the person “agrees by choice, and has the freedom and capacity to make that choice” (s 74);
- It is to be concluded that the person could not have consented in certain circumstances, which the accused knew about, for example, they were asleep or unconscious or overpowered by alcohol or drugs.

CONSENT-BASED DEFINITIONS IN THE EEA. EXAMPLE 2: SWEDEN

Swedish Criminal Code, Chapter 6, “Sexual crimes” (2018 law):

Section 1 (unofficial translation)

Anyone who conducts a sexual intercourse or another sexual act comparable to sexual intercourse with a person who does not participate voluntarily, is sentenced for rape [...]

When assessing whether participation is voluntary or not, it should especially be considered if voluntariness has been expressed through words or actions or in other ways. A person can never be considered to participate voluntarily if:

1. participation is a consequence of ill-treatment, other violence or threat of criminal act, threat of prosecution, or disclosure by another person,
2. the perpetrator exploits the fact that the person, due to unconsciousness, sleep, serious fear, intoxication or other drug influence, illness, bodily injury, mental disorder or otherwise is in a particularly vulnerable situation, or
3. the perpetrator causes the person to participate by seriously abusing the person's dependence on the perpetrator.

TWO-CRIME MODELS AND INTERNATIONAL HUMAN RIGHTS LAW?

1. CROATIA

Definition of rape:

- lack of consent **must be accompanied by force** (max penalty 10 years).
- Since 2013, the Croatian Criminal Code also distinguishes another, **lesser offence** of “sexual intercourse without consent” (max penalty 5 years).

Assessment of the CEDAW Committee (July 2015):

“**particularly concerned** by the following issues:

(h) Recent adoption of a less stringent definition of rape, as a qualified form of sexual intercourse without consent, resulting in the reduction of the gravity of rape as a criminal offence and in lighter sentencing.”

And recommended that Croatia:

“amend the legal definition of rape to bring it into line with accepted international standards.” (paras 18-19)

TWO-CRIME MODELS AND INTERNATIONAL HUMAN RIGHTS LAW? 2: SPAIN

Spanish Criminal Code

Article 178:

Whoever commits an act against the sexual freedom of another person, **using violence or intimidation**, will be punished as being responsible for **sexual assault** with imprisonment from one to five years.

Article 179:

When the sexual assault consists of sexual intercourse by vaginal, anal or oral route, or introduction of bodily members or objects by one of the first two routes, the person responsible will be punished as a prisoner of **rape with a prison sentence of 6 to 12 years**.

Article 181:

1. Whoever, without violence or intimidation and **without there being consent**, perpetrates acts against the sexual freedom or indemnity of another person, shall be convicted of **sexual abuse**, with a sentence of **imprisonment from 1 to 3 years or a fine of 18 to 24 months**.

2. For the purposes of the preceding Section, non-consensual sexual abuse is deemed to be that perpetrated on persons who are unconscious, or whose mental disorder is taken advantage of, as well as those committed by overcoming the will of the victim using narcotics, drugs or any other natural or chemical substance that is appropriate for such purpose. ...

4. In all the preceding cases, when the **sexual abuse** consists of vaginal, anal or oral **penetration**, or inserting body parts or objects into either of the former two orifices, the offender shall be punished with sentence of imprisonment from **4 to 10 years**.

SPAIN: LA MANADA CASE

July 2016:

gang rape of 18-year-old woman in Pamplona

April 2018:

Court finds lack of consent but acquits the 5 men of rape and convicts them of “sexual abuse” instead. Finding of lack of force or intimidation.

Widespread protests and calls for changing rape law.

December 2018:

Higher court upholds the decision.

June 2019:

Supreme Court finds there was intimidation and convicts the men of rape.



SPAIN: LA MANADA CASE AND PLANNED LAW REFORM

After the horror of the 'wolf pack' case, Spanish women have reason to be hopeful. The overturning of the original verdict in a notorious rape trial is a sign that attitudes towards sexual violence are changing.



La Manada ruling sparks fierce debate over definition of sexual violence

A court's decision to clear five men of rape in the high-profile "Running of the Bulls" case has raised questions about what constitutes intimidation.

Promised Spanish Law Could Change Legal Definition of Rape

Spanish prosecutors claim sex attack was not rape as victim 'did not fight back'



No sexual consent means rape, Spain told by legal panel

Spanish law will be toughened to define any non-consensual sexual act as "assault" or "rape" instead of "sexual abuse", experts have decided.

Spain to introduce 'yes means yes' sexual consent law

Move follows outrage over release of *la manada* gang who assaulted woman in Pamplona



Spain moves to toughen sex assault laws after 'Wolf-Pack'

Spanish government considers legal reform after court releases 'Manada' sex-attack culprits

THE POWER OF THE LAW

Adopting consent-based laws **will not stop rapes from occurring.**

It's only **one step** towards justice and must be accompanied by:

- good practice;
- training of relevant professionals, incl. lawyers;
- comprehensive sexuality and relationships education;
- raising awareness in society.

But:

Consent-based and human rights compliant law on rape is an important step towards achieving societal and normative change, guiding people's attitudes and behaviours and thus is crucial in rape prevention in the long-term.

THE POWER OF THE LAW

“The law is a symbol of what we in our society consider to be right and wrong. And the law should reflect what we think is wrong and what we think is right.

So, even though we don’t know if more people would be convicted... the important thing is that we have said that we think that every time you have sex without consent that it’s rape.

And I think that it will be reflected in our culture. And I think that’s actually the most important thing.”

“Anne”, 45, Denmark

(Amnesty International, “Give us respect and Justice! Overcoming barriers to justice for women rape survivors in Denmark.”)

More information on Amnesty International's website
Let's Talk About Yes regional campaign and resources:

<https://www.amnesty.org/en/latest/campaigns/2018/11/rape-in-europe/>

Thank you

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